IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL
WRIT PETITION NO. 356 OF 2006 (MS)

Sharad Kr. Sharma,
S/o Shri H.N. Sharma,
R/o Flat No. 2, Harthorn Willa Compound,
Charten Lodge, Mallital Nainital. .....Petitioner.

Versus

1. Commissioner, Kumaon Mandal, Nainital
2. Nainital Lakes Development Authority, through its Secretary.
3. Sub Divisional Magistrate, Nainital.

.....Respondents.

Mr. Dharamveer Sharma, sr. Advocate, assisted by Sri Manoj Tiwari, Advocated for the petitioner.
Sri U.K. Uniyal, sr. advocate, assisted by Sri Sobhit Saharia, Advocate for the respondent no. 2.
Sri Paresh Tirpathi, Advocate for the respondents no. 1 and 2.

Dated: 10.04.2006

Hon'ble Rajesh Tandon, J.

On 8th April, 2006, an order was passed by which Sri Paresh Tripathi has accepted notice on behalf of respondents no. 1 and 3 and Sri Shobhit Saharia has accepted notice on behalf of respondent no. 2.

Sri Shobhit Saharia has produced the record and has submitted that for deciding the petitioner record may be produced. Similar statement has been made by Sri Paresh Tripathi. Parties therefore, have prayed that the writ petition may be finally decided on the basis of the record produced in the Court.

Briefly stated, the dispute relates to a portion of Flat No. 2 in Plot-A of Horthorn Villa, Charlton Lodge Road. The

petitioner purchased, the premises namely Flat No. 2 Harthorn Will Compound, Charten Lodge, Mallital, Nainital by way of registered sale deed dated 14th August, 2002 and according to him, after his name was mutated in the municipal record,. He is continuously paying the house tax and other municipal taxes as and when it falls due. The ground for challenge is that prior to the purchasing of the accommodation, the construction was already in existence and intimation was given by the erstwhile landlord to the Lake Development Authority. Thereafter, the assessment had also taken place. The petitioner has further submitted that the construction was made in accordance with the G.O. dated 1st May, 1997 and 29th May, 1997, which were applicable at the relevant time on 1st May 1997 and as such any change in the earlier decision will not affect the construction, which has already been made. Both the G.O.s are quoted below:-

G.O. dated 1st May, 1997:-

महोदय,

नगर के पुराने एवं निर्मित क्षेत्रों में भवन मान–चित्र के स्वीकृति की प्रकिया को सरल किये जाने का निर्णयासन द्वारा लिया गया हैं इस संबंध में मुझे यह कहने का निदेश हुआ है कि पुराने एवं निर्मित क्षेत्रों में 100 वर्ग मीटर तक के भूखण्ड पर आवासीय भवनों के निर्माण/पुर्ननिर्माण व महयोजना व उपनियमों आदि के अनुसार सेटबैंक छोड़े गये है तथा निर्माण कुल मिलाकर 3 मंजिल से अधिक न हो। इसी प्रकार 100 वर्ग मीटर से अधिक व 300 वर्ग मीटर तक आवासीय भवनों के निर्माण, पुर्ननिर्माण एव जीर्णोध्दार के लिए भी भवन मान चित्र दाखिल किये जाने पर स्वतः स्वीकृत माने जायेंगे, किन्तु प्रतिबन्ध यह होगा कि अर्ह वास्तुविद् द्वारा तैयार भवन मानचित्र पर यह प्रमाण पत्र अंकित किया गया हो कि प्रस्तावित निर्माण/पुर्ननिर्माण/महयोजना एवं बाईलाज के अनुसार हो।

2– कृपया उपरोक्त आदेशों का कड़ाई से अनुपालन सुनिश्चित करे। इन निर्देशों के उपरान्त प्राधिकरण का संबंधित कर्मचारी 100 वर्ग मीटर तक के भू–खण्ड के भवन निर्माण के संबंध में नहीं जायेगा।''

G.O. dated 29th May, 1997 is quoted below:-

2– इस सम्बन्ध में मुझे यह कहने का निदेश हुआ है कि पर्वतीय क्षेत्रों में गठित विकास प्राधिकरण विशे ा क्षेत्र विकास प्राधिकरण व उत्तरप्रदेश आवास एवं विकास परि ाद की योजनाओं में उपरोक्त ाासनादेशों में की गयाी व्यवस्था लागू नहीं होगी। पर्वतीय क्षेत्रों में निर्यात एवं विकास तथा भौगोलिक परिस्थितियॉ भिन्न होने के कारण उनके लिए अलग से निर्देश जारी किये जायेंगें।

कृपया उपरोक्त आदेशों का अनुपालन सुनिश्चित किया जाये।''

The petitioner has submitted that the Commissioner while passing the order dated 5th April, 2006 has not considered the implication of the G.O. applicable at the relevant time and thereafter the G.O. was amended by order dated 28th may, 1997 and inspite of the directions given by the Revisional Authority on 4th November, 2000 the order of demolition has been passed without perusing the said G.O.s.

I have perused the entire record concerning Flat No. 2 Harthorn Willa Compound. Proceedings for demolition were initiated in respect of 2nd Floor with regard to the construction of one room measuring 4X10 metres X 7 meter and one toilet. Initially the proceedings were started against one Sri Mukul Gupta son of Sir Y.N. Gupta under Section 25 and 26 of the Urban Regulation Builing Operation Act. However, the petitioner has purchased the premises on 14th August, 2002. Sri Paresh Tripathi appearing on behalf of the State has submitted that he has not to submit anything except the record produced by Sri shobhit Saharia, learned counsel for the respondent no. 2.

However, the construction according to the petitioner was already complete as will appear from the intimation given by Sri Mukul Gupta on 25.05.1997 to the following effect:-

"***Sub:-*** *Construction of one room set on roof of my flat No. 2 in Howthorn Villa Charten Lodge Road, Nainital under G.O. No. 1614/9* vk&*3.97.38-fofo/k* *197 dated 01-05-1997.*

Dear Sir,

It is to inform you that I have constructed one room set on the roof of my flat no. 2, on a plot area of 110 sq mt., and as per G.O. No. 1614/9 vk *-3-97-38-* fofo/k *197, no. permission for this construction was required. Now since I have completed the construction, I am informing you about the same for your reference."*

The revisional Court has held as under:-

भउपर्यक्त पुनरीक्षण में दिनांक 21.10.2000/2.11.2000 को बहस सुनी गयी। जिसमें पुनरीक्षणार्थी का तर्क यह था कि 01 मई 1997 को उ0प्र0 शासन द्वारा शासनादेश जारी किया गया जो समस्त अध्यक्ष विशे ा क्षेत्र प्राधिकरण को निर्गत है तथा विपक्षी के यहां भी लागू है। विपक्षी ने ऐसा कोई प्रमाण नहीं दर्शाया कि उक्त शासनादेश नैनीताल में प्रभावी नहीं है। यह भी कहा गया कि उक्त निर्माण पूर्ण होने की सूचना प्राधिकरण को अपने पत्र दिनांक 25.5.97 द्वारा दे दी थी। पत्र की प्रति भी संलग्न की गयी। नगरपालिका में दिंनाक 01.4.97 व 15.6.97 को एसेसमेंट भी हो चुका है जिसकी प्रतियां भी पत्रावली पर दी गयी हैं आगे कहा गया मई 1999 में भारी व ार्ा के कारण अस्थायी टिन ोडलीक हो जाने के कारण उसके स्थान पर नई टिन ोड प्राधिकरण को दिनांक 15.5.99 को सूचित करते हुये डाली गयी किन्तु कुछ द्वे ा भाव रखने वाले व्यक्तियों की शिकायत पर प्राधिकरण ने पुनरीक्षणकर्ता के विरूद्व कार्यवाही कर दी गयी। यह भी कहा गया कि पुर्ननिर्माण/जीर्णोद्वार नियमों में प्रतिबंधित नहीं है। अतः आयुक्त महोदया का आदेश विधि के अनुरूप नहीं है। अतः उक्त आदेश निरस्त किये जायें।''

In view of the above, the predecessor of the petitioner before coming into force the G.O. dated 29th May, 1997, has already constructed a small room and bathroom and the same was complete and therefore, the G.O. cannot be said to be applicable in the case of the petitioner as the constructions were already in existence.

I, therefore, find merit in the submission made by the petitioner. A writ of certiorari is issued quashing the orders

dated 22.08.2001 and 5th April, 2006 passed by the respondents no. 2 and 1 respectively.

Writ petition is allowed. No order as to costs.

(Rajesh Tandon, J.)

10.04.2006

Rathour